

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ERIN M. RICE**

Claimant

VS.

**FIRST STUDENT MANAGEMENT, LLC**

Respondent

AND

**NEW HAMPSHIRE INSURANCE COMPANY**

Insurance Carrier

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Docket No. 1,057,903

**ORDER**

Respondent and its insurance carrier appealed the January 17, 2013, Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. This appeal was placed on the Board's summary docket for disposition without oral argument.

**APPEARANCES**

Robert R. Lee of Wichita, Kansas, appeared for claimant. John David Jurcyk of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 8, 2013, motion hearing and exhibit thereto; the transcript of the June 7, 2012, preliminary hearing and exhibits thereto; together with the pleadings contained in the administrative file.

**ISSUES**

In the January 17, 2013, Order, ALJ Barnes granted claimant's request for penalties. The ALJ awarded penalties against respondent at the rate of \$100.00 per week for being 26.86 weeks late in paying benefits, for a total amount of \$2,686.00 in penalties. The ALJ also ordered respondent to pay temporary total disability benefits from February 5, 2012, through August 2, 2012.

Respondent contends claimant's demand letter did not satisfy the requirements for specificity set forth in K.S.A. 44-512a and claimant is not entitled to penalties. Respondent requests the Board reverse the order for penalties.

Claimant requests the Board affirm the January 17, 2013, Order in all respects. Claimant asserts her demand letter sets forth with particularity the items of compensation claimed to be unpaid and past due.

The issue before the Board on this appeal is:

Did claimant's demand letter dated June 8, 2012, set forth with particularity the items of disability claimed to be unpaid and past due as required by K.S.A. 44-512a(a)?

#### **FINDINGS OF FACT**

After reviewing the record and considering the parties' arguments, the Board finds:

Findings one and three through seven of ALJ Barnes' January 17, 2013, Order accurately detail the relevant facts and are incorporated by reference herein.

ALJ Barnes issued a June 7, 2012, Order that awarded claimant temporary total disability benefits (TTD) beginning February 5, 2012, and continuing until she was released to substantial and gainful employment. Despite the fact that claimant testified she earned \$8.20 per hour and worked an average of 25 hours per week, ALJ Barnes inexplicably ordered that TTD be paid at a rate agreed upon by the parties. Neither party appealed the June 7, 2012, Order.

Claimant sent a demand letter dated June 8, 2012, by certified mail to respondent's counsel. The demand letter was sent prior to June 21, 2012, the date respondent sent a letter to claimant asking that claimant agree to a TTD compensation rate of \$117.68 per week. On June 25, 2012, claimant's attorney sent respondent's attorney an email agreeing to a TTD compensation rate of \$117.68 per week and asking that the TTD be paid pursuant to court order. At the penalties hearing, respondent indicated that it never received a reply from claimant's counsel to the June 21, 2012, letter. Claimant's brief to the Board indicated that on June 21, 2012, the parties agreed to a TTD compensation rate of \$117.68 per week and referenced claimant's exhibit 1 to the motion hearing.

The June 8, 2012, demand letter, which is attached to claimant's application for penalties filed with the Division of Workers Compensation on October 15, 2012, states in pertinent part:

Dear John:

Pursuant to the enclosed Order dated June 7, 2012, please consider this letter as a twenty (20) day demand for:

. . . .

3. The Claimant is entitled to temporary total disability beginning February 5, 2012 and continuing until the Claimant is released to substantial and gainful employment. Temporary total disability is to be paid at a rate to be agreed on by the parties.

In her January 17, 2013, Order, ALJ Barnes implied claimant's June 8, 2012, demand letter satisfied the requirements of K.S.A. 44-512a(a) by awarding claimant penalties of \$100.00 per week for 26.86 weeks.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 44-512a(a) states:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

In her application for hearing, claimant alleged February 8, 2011, and August 16, 2011, through August 23, 2011, as her dates of accident. From the preliminary hearing transcript it appears claimant was seeking medical treatment and TTD for injuries sustained on February 8, 2011.

From the record it appears that from February 5, 2012, through August 2, 2012, respondent only paid claimant one week of TTD. Respondent's defense is that claimant's attorney failed to set forth with particularity the items of disability claimed to be unpaid and past due as required by K.S.A. 44-512a(a).

In *Medlin*,<sup>1</sup> claimant sent a demand letter requesting penalties for unpaid medical expenses of \$1,266.99. Accordingly, the penalty could not be greater than \$126.69. By the time the penalty hearing took place, claimant's medical expenses had risen to \$4,661.30. The ALJ awarded claimant penalties of \$466.13. The Board held:

As previously noted, a demand letter must set forth with particularity the amount of the bill that is past due. When the demand letter was sent to respondent that amount was \$1,266.99. Accordingly, the penalty could be no greater than \$126.69. Despite the fact that respondent was or should have been aware of these bills, the Board is compelled to adhere to and enforce the statute. Consequently, the ALJ's Order is modified to assess penalties against respondent in the amount of \$126.69.

In *Campos*,<sup>2</sup> the Board refused to order that respondent pay penalties for claimant's Via Christi medical expenses. The Board held:

Claimant's request for penalties for the Via Christi expense fails for two reasons. First, the April 25, 2000 written demand did not specifically address the Via Christi expense. Therefore, claimant failed to follow the procedural requirements of the penalty statute as the demand did not set forth the unpaid medical expense with "particularity." . . .

In *Amador*,<sup>3</sup> the Board found claimant filed a demand that did not specify the dates and amounts of the disability payments that were unpaid or paid after they were due. The Board held, "Claimant's Demand for Compensation contains no particulars concerning what disability payments were unpaid or past due."<sup>4</sup> The Board denied claimant's request for penalties, in part, because claimant's demand did not set forth with particularity the compensation that was unpaid or past due.

When claimant sent her demand letter, the parties had not yet agreed on claimant's weekly benefit rate. Therefore, neither party knew the amount of TTD that was due and owing claimant. Claimant's demand letter states, "Temporary total disability is to be paid at a rate to be agreed on by the parties." The demand letter was premature and does not set forth with particularity the compensation that was unpaid or past due. Nothing was due until the parties agreed to the TTD compensation rate. After the parties reached an

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<sup>1</sup> *Medlin v. Southwestern Bell Telephone*, No. 244,701, 2006 WL 1605904 (Kan. WCAB May 31, 2006).

<sup>2</sup> *Campos v. Western Plains Regional Hospital*, No. 205,604, 2000 WL 1929331 (Kan. WCAB Dec. 19, 2000).

<sup>3</sup> *Amador v. National Beef Packing Company*, No. 1,037,021, 2013 WL 862029 (Kan. WCAB Feb. 27, 2013).

<sup>4</sup> *Id.*

agreement on the TTD compensation rate on June 25, 2012, claimant could have sent a specific and timely demand that complied with K.S.A. 44-512a. The June 25, 2012, agreement concerning the TTD compensation rate does not “relate back” to the June 8, 2012, demand. Therefore, the Board finds that no penalties should be imposed against respondent.

Sadly, claimant received one TTD payment between June 7, 2012, and January 8, 2013, the date of the motion hearing. Based upon the email of claimant’s attorney agreeing to the TTD compensation rate, respondent should have been paying TTD after receiving the email. Respondent escaped the penalties because the claimant’s demand did not meet the requirements of K.S.A. 44-512a.

**WHEREFORE**, the Board reverses that part of the January 17, 2013, Order entered by ALJ Barnes awarding claimant penalties. The remainder of the Order that is not inconsistent with the above remains in effect, including the ALJ’s award of temporary total disability benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April, 2013.

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BOARD MEMBER

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Nelsonna Potts Barnes, Administrative Law Judge